In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 405

JOHN L. LODWICK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1969. On June 26, 1969, the court of appeals denied petitioner's petition for rehearing (Pet. App. A19). On July 28, 1969, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to August 25, 1969, and the instant petition was filed on July 29, 1969.

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper legal standard in reviewing the sufficiency of the circumstantial evidence to support the jury's verdict of guilty.

2. Whether the evidence adequately showed that petitioner's mental condition was consistent with a finding of wilfulness.

STATEMENT

After a jury trial, petitioner was convicted of attempting to evade his income taxes for 1961 by filing a tax return wherein he reported taxable income of $7,257.17 for salary, dividends, interest and capital gain (A. 6, 60, 63, 439).[1] The government introduced evidence to establish that during 1961 petitioner received additional income of $6,625 from fifteen criminal fines imposed by petitioner on defendants who appeared before him in Magistrate Court (A. 233-234). Of this amount, a total of $2,875 was paid to and received by petitioner in currency (A. 106, 121, 125-128, 133, 137, 150, 195, 198, 204, 585). An additional $3,400 was paid by checks (and one money order), all of which were endorsed by petitioner and thereafter cashed at various banks (A. 109-110, 122-123, 230-231, 515-520, 523-524, 526, 528-529, 573), except that two of such checks totalling $650 were deposited by petitioner in a spe-

[1] "A." references are to the three-volume joint appendix in the court of appeals.

cial account which, petitioner testified, he opened as a depository for two specific fines totalling $1,000 so that the fines could be easily refunded when the defendants successfully completed their terms of paroled sentences (A. 122-123, 288-294, 368-369, 380-381). Petitioner testified that, to his knowledge, no refunds of these sums were made (A. 381). Clerks who served in petitioner's court denied any knowledge of this special account (A. 169, 183, 220), which was closed out by a check signed with petitioner's name but of which petitioner denied execution, knowledge, or benefit (A. 376, 381-382, 392-393, 566, 568).

The fines involved were not included in the monthly disbursement checks to the County Treasurer (A. 174-180), although the costs imposed in these cases were accounted for on the customary fee sheets and disbursed to the Sheriff, County Prosecutor, and Director of Revenue (A. 448, 449; 577, 578; 583, 584; 569, 570; 452, 453; 586, 587; 589, 590; 468, 469; 450, 451, 571; 455, 456; 465, 466; 459, 574; 462, 463).

Petitioner denied personally receiving any of the fines involved and testified that he endorsed the checks as a way of signifying to his clerks that he approved acceptance of the check in payment of the fines (A. 371, 375, 393). Office clerks testified that petitioner signified orally his approval of checks and that all checks received were deposited in the Magistrate Court bank accounts after being endorsed with a rubber stamp (A. 161-162, 227), and they denied cashing any of the checks (A. 180-182, 216, 226).

Petitioner testified that he signed a 1961 tax return, which was prepared for him by his brother, while he was undergoing hospitalization to cure a reaction from cortisone medication taken over a period of years and that he did not specifically recall signing the return (A. 373-375). His mother testified that he seemed "confused" and uninterested in what he was signing (A. 356-357), and other defense witnesses testified that he appeared "emotionally upset" (A. 353) or "distraught" (A. 327) at the time. The attending hospital physician testified that he noted no lack of understanding or mental confusion on petitioner's part, that his mental condition and conversational responses were normal although he was a sick man, and that his situation was not such as to affect his knowledge of signing a tax return (A. 404-414).

ARGUMENT

1. There is no merit to petitioner's multifarious points (Pet. 15-30) contesting the sufficiency of the circumstantial evidence introduced against him. Both the trial court (A. 89, 235, 415) and the court of appeals (Pet. App. A3-A6) concurred with the jury verdict, and, in these circumstances, it would normally be regarded as conclusive. *United States* v. *Johnson*, 319 U.S. 503, 518.

Petitioner's contention that, in evaluating the sufficiency of the evidence by a "substantial evidence" test, the court of appeals misapplied *Holland* v. *United States*, 348 U.S. 121, 139-140, is without substance. In *Holland* this Court rejected the premise

that there is an intrinsic probative difference between circumstantial and direct evidence. The jury in this case was given a thorough instruction on the reasonable doubt standard with respect to circumstantial evidence (A. 424). If, as stated in *Holland*, the test for the jury to apply is "reasonable doubt," it would be anomalous to apply the "exclusive hypothesis" standard to appellate review. In various circumstantial evidence cases, this Court has repeatedly confirmed that a motion for acquittal at the close of a case raises a question of law "which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254. See also *Glasser* v. *United States*, 315 U.S. 60, 80; *Gorin* v. *United States*, 312 U.S. 19, 32; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787.[2] That is precisely the approach taken by the courts below here, and further review is thus not warranted.

2. Petitioner's defense of emotional illness was not pleaded on the basis of insanity but rather in regard to the issue of wilfulness (A. 361-362), much like the "psychological disturbance, amounting to

[2] The Fifth Circuit's adherence to a special rule for circumstantial evidence is not a conflict which calls for resolution in the face of the clear exposition of the matter by this Court in *Holland*. While petitioner also cites (Pet. 28-29) the Third and Ninth Circuits as in accord with the Fifth Circuit, the latter court views them as opposed to its view. *Battles* v. *United States*, 388 F. 2d 799, 802, n. 3 (C.A. 5).

something more than worry but something less than insanity," which was considered in *Spies* v. *United States*, 317 U.S. 492, 493. As noted by the court of appeals (Pet. App. A5-A6), this issue was submitted to the jury without objection by petitioner on an instruction (A. 433) which was adapted by the trial court (A. 339, 419) from *United States* v. *Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832. Petitioner apparently does not contend (see Pet. 30-33), however, that any special test for circumstantial evidence should apply to this issue. Here, moreover, the proof on this issue consisted solely of direct evidence. At all events, the court of appeals was correct (Pet. App. A6) in noting that the jury finding of a criminal intent has a "substantial evidentiary basis."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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